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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1304

BORRIS M. KOMAR,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITIONER'S REPLY BRIEF

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POINT I

Respondent disregards the record and the opinions of the state courts.

Respondent asserts on page 2 of its brief that "that the primary issue presented is whether a writ of *coram nobis* may be used as a vehicle for an additional appeal, where all alleged errors not only appeared on the face of the record," etc.

The only issue presented by the petition *coram nobis* is thus stated in the petition:

"2. That this petition is brought upon the grounds that your petitioner was denied a fair trial within the

* Italics are ours, unless otherwise indicated.

meaning of the due process provisions of the Fourteenth Amendment of the United States Constitution * * *" (R. p. 8).

On the next page 3 of its brief the respondent admits "that the matters raised by the petition were previously presented by the petitioner in a motion for a new trial and in an unsuccessful appeal, *except for the charge of alleged deprivation of constitutional rights*".

If the question of petitioner's deprivation of his constitutional rights was not raised on the trial or on prior appeals, how such deprivation could have become "an error" on the trial?

On pages 13 and 14 of its brief the respondent cites numerous New York cases that errors on trial cannot be reviewed by a writ of *coram nobis*. Thus, New York has no post conviction remedy in cases involving a violation of constitutional guarantees safeguarding life and liberty in criminal cases under United States Constitution. Thus, this case squarely presents the question left open in *Case* v. *Nebraska,* 381 U. S. 336, whether the Federal Constitution compels the States to provide an adequate post conviction procedure to consider complaints based on alleged violations of said federal guarantees. (See Point IB on pp. 11 and 12 of the petition.)

While the question of fact is eliminated in this case by failure of the respondent to demand and the state courts to direct a hearing (Point III of the petition at pp. 17-19) and this Court makes its own examination of facts and is not bound by respondent's statements, respondent completely ignores the opinion of the Court of Special Sessions, and its own admissions in its answer to the petition *coram nobis*:

"9. I have carefully read all the testimony in this case. All the papers, affidavits and exhibits on the

motion to set aside the conviction and for a new trial and the briefs submitted on the appeal to the Appellate Division. *I find that the sole question of fact which was vigorously disputed was: Whether this defendant was the owner or responsible party in control of the premises involved, on the charge dates.* Most of the testimony concerned this question" (R. pp. 19 and 20).

Since the ownership of the premises on the charge date (and there was only one—February 26, 1959) was "the sole question of fact" tried, the speculations of the respondent as to any other possible ground of conviction are without any foundation.

The opinion of the trial court, disregarded by the respondent confirms that the court acted on this, the only controverted issue on the trial solely because it believed *without seeing the city record held by the prosecutor and showing that on January 21, 1959 Walker declared himself the owner of the premises in question, asserted that the title to the premises was in Amcol Residences, Inc. and that the defendant had no interest whatever in said corporation* (R. pp. 10-13) that a perjury was committed in the case. The court said:

> "The motion to dismiss as to each count is denied; the defendant is found guilty of each count.
>
> The Court is also of the opinion after listening most carefully to the testimony in this case that there has been perjury, rampant perjury and subornation of perjury" (R. p. 17).

The only question on this application is, whether the perjury was committed by the prosecutor or by the defendant and the notary public. It was the prosecutor who concealed from the trial court the city record held by the

prosecutor showing admissions of his witness, Walker, that on January 21, 1959 the title to the premises was in Amcol Residences, Inc. On page 6 of its brief, respondent states that early in 1959 (presumably March; R. p. 10) Walker told the defendant "that Amcol was not the owner *of record*". Walker, as an experienced real estate broker, knew that before deed could be recorded it must exist as a duly executed instrument. His use of the well known term proves that the deed must have been executed as it shows on January 8, 1959. And Walker would not have applied to Embar Funding Corporation for a building loan for Amcol, unless he knew that Amcol had the title, for he knew as a broker that loan would not be made except to the owner of the title to the premises in question.

Respondent not only used perjury to obtain conviction but it uses false statements to sustain it. Defendant had only one transaction with architect Krause in 1951 to get an alteration plan approved for the premises. Between 1951 and 1958 defendant had no dealings with Krause whatever. In 1958 at the request of Walker who saved thereby almost a half of architect's fee, defendant informed Krause that he sold the premises to Walker, gave him Walker's address and told him that he wants to refile the alteration plans for the premises in the name of Walker's corporation Amcol. Defendant never received the proposed alteration application from Krause, never forwarded it to Walker, never knew that it was prepared or submitted by Krause to the city, never saw the approved application, and never knew when it was approved by the city and delivered by Krause to Walker. Krause could not be cross-examined by defendant because he was not produced by the prosecutor as his witness, and no affidavit could be procured from him by the defendant because Krause was somewhere in Florida on a vacation when the prosecutor tendered to the Court Krause's colored statement prepared by the prosecutor.

Moreover, if for argument's sake, we assume that defendant gave to Krause the information for city's alteration application, how that helps the prosecution. The application said that fee to the premises on January 21, 1959 was in Amcol, that the only officers and directors of Amcol were Walker and his secretary Ralph Hawkins; that they were the only persons interested in the premises; that Walker was the ultimate owner as he was the only stockholder of Amcol. These were the natural facts that resulted from the transfer of title by defendant to Amcol on January 8, 1959, and Walker, an experienced real estate broker, adopted these facts and confirmed them by his signature on January 21, 1959.

Section 392 of New York Code of Criminal Procedure provides:

> "The rules of evidence in civil cases are applicable also to criminal cases, except as otherwise provided in this Code."

Thus, Walker's testimony attempting the change of dates on the deed, mortgage and bond had no probative value as contrary to parol evidence rule (*Fogelson* v. *Rackfay Const. Co.*, 300 N. Y. 334, 338; *Higgs* v. *De Maziroff*, 263 N. Y. 473, 477; *Thomas* v. *Scutt*, 127 N. Y. 133, 142). Consequently, the record is bare of any facts showing defendant's ownership of the building on February 23, 1959. Motions were made to dismiss the prosecution's case for failure to prove any facts to sustain it both at the end of People's case and of the whole case, and exceptions taken. Conviction without facts to support it in the trial record is a violation of due process and cannot stand. (*Napue* v. *See*, 360 U. S. 264; *Sterling* v. *Constantin*, 287 U. S. 378, 398; *Fiske* v. *Kansas*, 274 U. S. 380, 285-6; *Cresswell* v. *Grand Lodge*, 225 U. S. 246, 261.)

Parol evidence rule was devised to "prevent fraud and injustice", "perjury and infirmity of memory" (*Thomas*

v. *Scutt,* 127 N. Y. 133, 142). Here, the trial court overruled defendant's objection and exception to permit commission of perjury by People's witness. Due process of law required by the Federal and State Constitutions was violated, and the conviction must fall. (See Petition at pp. 16-17 and *Mesarosh* v. *United States,* 352 U. S. 1, 9 and 14.)

The State courts denied defendant's *coram nobis* application solely on the state procedural rule that he should have raised his constitutional objections by an appeal (R. p. 28). This case raises the same question as to the effect of such state rule on the enforcement of guarantees of life and liberty of a citizen under the protective provisions of the United States Constitution as remained unanswered in *Henry* v. *Mississippi,* 379 U. S. 443 (see Point IA in the petition at pp. 8-11).

As Mr. Justice Goldberg said in *Pointer* v. *Texas,* 380 U. S. 400, at page 414:

> "And, to deny to the States the power to impair a constitutional right is not to increase federal power, but, rather, to limit the power of both federal and state governments in favor of safeguarding the fundamental rights and liberties of an individual. In my view this promotes rather than undermines the basic policy of avoiding excess concentration of power in government, federal or state, which underlies our concepts of federalism."

POINT II

Defendant did not waive his Federal Constitutional guaranty of due process, free from prosecutor's deliberate fraud on the Criminal Court.

On pages 9-11 of its brief, respondent cites federal and state cases holding that where the defendant fails to claim a violation of his constitutional rights in prior appeals, he

waives such rights. All of these cases were decided prior to *Fay* v. *Noia*, 372 U. S. 391, 438 and *Townsend* v. *Sain*, 372 U. S. 293, 317, published in 1962.

In *Townsend* v. *Sain, supra*, this Court said at page 317:

> "The standard of inexcusable default set down in Fay v. Noia, 372 U. S. 391, 438 adequately protects the legitimate state interest in orderly criminal procedure; for it does not sanction needless piecemeal presentation of constitutional laches in the form of deliberate by-passing of state procedures."

No claim has been made by the respondent in its brief that the petitioner "deliberately by-passed any state procedures", nor that he "intentionally relinquished or abandoned" any of his constitutional guarantees of life and liberty granted to him by the Federal Constitution. Hence, merely an unintentional oversight in asserting these guarantees on his direct appeal from his conviction was not a bar to his subsequent state application asserting such guarantees by the way of *coram nobis* application, nor is a bar to this petition for a certiorari review of the refusal by the state courts to enforce the due process of law in trial of criminal cases required by the Constitution of the United States.

POINT III

Facts in the record refute respondent's irresponsible inferences.

We have pointed out that the respondent by failing to ask and the state courts by failure to order the hearings on defendant's petition for *coram nobis* waived any question of fact and accepted as true the facts alleged in the petition (see petition at pp. 15 and 16 and Point III at pp. 17-19). Thus, the petition is deemed dismissed solely as a matter of law.

Nevertheless, because of completely irresponsible misrepresentation of facts in the respondent's brief we are constrained to point out the lack of any evidence to support the claims of the respondent. Our references will be to the Appellate Division record improperly submitted by the respondent with its brief,

The cases cited by the respondent are not in point. *Smith* v. *Feigin,* 273 App. Div. 277, aff'md 286 N. Y. 534 and *Sohmer Factors Corp.* v. *278 Corp.,* 13 Misc. (2) 142 are civil cases dealing with piercing of corporate entity.

The law is settled in New York that unless a person connected with a corporation is directly in charge of the maintenance of its properties, he is not chargeable with corporate crimes arising from corporate neglect (*People* v. *Dalsis,* 5 App. Div. (2) 28, 34; *People* v. *England,* 27 Hun 139, 140).

Did the defendant have control over Amcol Residences, Inc. and did he have dominion over the premises?

If the transfer of title to Amcol Residences, Inc. was sham, why Walker would advance incorporation expenses and undertake to finance filing, stamp and mortgage fees (RD, pp. 207-8). Why would Walker hire and pay the architect (RD, p. 227), receive and keep the alteration plans (RD, p. 294), hire the alteration contractor (RD, p. 214) and procure the building loan (RD, p. 87)? Why Walker called himself "purchaser" in the contract of sale on December 12, 1958 (RD, pp. 207-212) and not broker or agent? Why Walker demanded by letter delivery to him *as corporate owner* of corporate books of Amcol Residences, Inc. held by defendant as Amcol's attorney as is customary (RD, p. 255). Why Walker paid five hundred dollars for expenses of building loan, if he did not consider the building his and not defendant's?

If the defendant intended to retain the control of Amcol Residences, Inc., why he did not issue any stock to him-

self? Why the defendant permitted Walker to be the only stockholder with recorded ownership of half of the stock (RD, pp. 219-220)? Why defendant allowed Walker and his secretary Hawkins to be the only officers and directors of Amcol. Why Walker signed all the contracts of Amcol—with the architect, alteration contractor and the mortgagees—and not the defendant. Why Walker never opened a bank account for Amcol, so as to avoid defendant's knowledge of corporate expenses. Why Walker designated as Amcol offices in his alteration application his own office and not that of defendant (R. p. 12).

Defendant employed Kraus as his architect only once in 1951, and Kraus' affidavit as to his dealings with defendant refers only to 1951. Defendant did not supply information to Kraus as to his application in 1959 for alteration as Kraus had all the information as to the building since 1951 in his file and the rest of information was supplied to him by Hawkins, Walker's secretary, when on January 9, 1959 he called on Kraus at his office, paid him fifty dollars deposit supplied by Walker and brought him retainer signed by Walker (RD, p. 257). Defendant never received alteration plans from Kraus nor ever forwarded them to Walker. Kraus brought the application himself to Walker, had him sign it, received from him the balance of his fees and delivered to Walker approved plans (RD, p. 267). Defendant even did not know when any of these events took place and when the plans were approved (RD, p. 257).

Defendant never knew of the Department of Health inspection of the premises until served with summons on March 30, 1959 (RD, p. 11); the books of Amcol Residences, Inc. have never been destroyed but were at the time of trial in possession of attorneys for Swansea Realty Co., Inc. then owner of the premises (RD, p. 123) and the only step taken by defendant as to architect Kraus was to introduce him to Walker so that Walker could

and did save on the architect's fee, because of ready plans in possession of Kraus made in 1951.

All the corporations incorporated in defendant's office for almost fifty years had dummy directors until the first meeting of incorporators as such use simplified filing and preparation of papers in a busy lawyer's office. The initial incorporators were superseded by Walker and his secretary Hawkins as directors and officers of Amcol Residences, Inc. (RT, p. 12) who were independent principals and not dummies of defendant.

Walker not only received *but endorsed* his certificate for 100 shares of Amcol (RD, p. 208) and deposited it with defendant as security for the mortgage as provided in agreement of December 12, 1958 (RD, p. 208).

Defendant did draw a letter to the Building Department for the Amcol corporation, because it was a legal paper required by the Department and defendant was Amcol's lawyer.

Defendant had no control of the premises since December 12, 1958 when he delivered the keys to Walker as purchaser (RD, pp. 69-70).

On May 30, 1959, defendant went with Walker to see the progress on the renovation work on the premises. Walker opened the premises for inspection as defendant had no keys thereto and Walker had. On the same day, he wrote the following letter to Walker:

> "I was really disgusted with the sight of the above premises when we inspected it last week * * *" (p. 71).

Clearly, the control and the duty to maintain the premises in proper condition since December 12, 1958 were in Walker as purchaser and as vice-president of Amcol Residences, Inc. in actual charge of the building and the alteration thereof then in progress. He was a real culprit whom the City deliberately avoided to prosecute in exchange for false testimony.

On January 8, 1959, defendant transferred property worth twenty thousand dollars to Walker without a cent's payment. Defendant had to protect his purchase money mortgage, as he took no stock in the corporate owner, and did not control it. So, he provided that he should hold Walker's stock and the resignations of Walker and his secretary Hawkins as securities for his mortgage, and Walker's compliance with his purchase contract. Defendant's mortgage became valuable only if the building was renovated and rented. Otherwise, defendant held a white elephant subordinated to the building loan, and without substantial market value. Defendant sought and had no control at all, but merely a security.

If the trial court proceeded on this sham ownership theory, then it did not have to brand publicly the defendant as perjurer and another reputable attorney as subornator of perjury, as the facts cited by the respondent in support of its theory of sham ownership were not disputed by either attorney in their testimony. The conclusions from these facts made by respondent are illogical. The sole fact where the testimony clashed was the date of title transfer and this is the fact on which the prosecutor tendered his perjurious witness, Walker.

CONCLUSION

That the petition for a writ of certiorari to the Court of Appeals of the State of New York should be granted, and the said writ be issued to the said Court.

Dated: New York, N. Y., June 11, 1966.

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